CRI/T/76/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

TSEHLA BELEME 1st Accused
MOEKETSI MOEKETSI 2nd Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 16th day of August, 1991.

The accused is charged with the murder of Makhalema Sejanamane on the 23rd day of May, 1989 at Sekhutlong in the district of Mokhotlong. He pleaded not guilty to the charge.

Khongoanyana Khongoanyana (P.W.1) testified that his home is at Tsieng. He is 20 years old. One day A1 and one Mofokeng (P.W.2) arrived at his place. He was at the kraal. It was just before sunset. A1 requested him to accompany him to Sekhutlong in order to help him catch his horse. He agreed. The distance from his home to Sekhutlong is about 1½ kilometres. When they arrived at Sekhutlong A1 instructed them to go ahead while he

remained behind. They stopped and waited for the A1 at a distance of about fifty paces from him. While they were waiting for A1 the deceased appeared from the direction of their village. He was on horseback and two dogs accompanied him. The A1 sat down and when the deceased passed near him he fired at him with gun. The deceased fell down. P.W.1 says that he shouted at the A1 and asked him why he was shooting the deceased. A1 said the deceased troubled him by doing many things but he did not describe those many things the deceased did.

P.W.1 says that after the shooting of the deceased he went nearer to A1 who threatened to shoot them if they reported to any person what had happened. A1 took the deceased and put him on the side of the path. He then ordered them to go home. The gun A1 had was about 1½ feet long. From there he went to the cattle post while A1 and P.W.2 went home. A2 was not there.

Under cross-examination P.W.1 said that he did not know a pistol before this incident but P.W.2 told him that such a gun is called a pistol. He was adamant that on that day A1 was holding a gun though he had previously not seen him carrying any gun. He denied that on that day and time A1 was at Methalaneng. He had known A1 since his (P.W.2's) childhood. AT the time A1 called him he was at the kraal and preparing to go to the cattle post. That is the reason why after the shooting he went to the cattle post. He denied that he was mistaken about the identity of the A1 as the person who invited him to go to Sekhutlong with him. When the deceased arrived at Sekhutlong it was after sunset but it was not yet dark. He denied

that his vision was obscured by the maize plants in the nearby field. The top part of stalks had been cut and used as fodder. A1 was wearing a red blanket which he often wore in the village. He did not know if A1 owned any horses but he often saw him riding a horse. A1 shot twice. He saw that the deceased had a wound on the forehead.

P.W.2 testified that on the 23rd May, 1989 A1 came to him and asked him to go with him to Sekhutlong to help him catch his horse. They went to P.W.1's place and A1 made a similar request to P.W.1. When they arrived at Sekhutlong A1 instructed them to go ahead while he remained behind. They complied and waited for him about 50 paces away. Some time after they had been waiting they saw the deceased coming from their village towards where they were because the path leading the deceased's place passes there. Deceased was on horseback and was with his two dogs. As the deceased was passing near A1, P.W.2 heard a gun report and the deceased fell down. A1 took him and placed him on a contour furrow of a maize field. P.W.2 asked the A1 why he shot the deceased. He said the deceased was troubling him by causing his arrest. He threatened to shoot and kill them in a similar manner if they revealed to any person that he had killed the deceased.

P.W.2 testified further that on the previous day he had seen A1 in Tsieng village. He was at the fence. He had one gun report. A1 was wearing a red blanket on that day. A1 wanted them

to be witnesses of his killing of the deceased. He saw blood oozing from the forehead.

'Mamontseng Setsumi (P.W.3) testified that on the day in question she was at her home. The deceased arrived and stopped to talk to her. While they were talking she saw A1, A2, P.W.1 P.W.2 and one Sami passing below her house and going in the direction of Sekhutlong. The road along which they passed is about 50 paces from her house. When the deceased left her home she took the same direction taken by the accused and the Crown witnesses. It was at dusk.

Under cross-examination P.W.3 stated that although it was after sunset it was still clear and he saw the five people well. At the time she saw them they had just passed her home and he saw their backs. She denies that only three people passed there according to P.W.1 and P.W.2. She went further to say that even during the day she saw the five people she has mentioned above, shearing goats at the home of Ramotsoafi. She was adamant that A1 has always been in Tsieng village and that during the day on the 23rd May, 1989 he was shearing goats at the home of Ramotsoafi. She was in the house when the deceased arrived and he remained mounted during their conversation. She was tired and was inside the house when the deceased arrived. She says that she saw the five men before she went into the house and denies that in her evidence-in-chief she said they passed while she was talking to the deceased.

The evidence of Mopapa Mopapa (P.W.5) is to the effect that on the 24th May, 1989 he went to the scene of the crime with the police. The deceased had a wound on the forehead, a wound at the back of the head behind the right ear. On the 26th May, 1989 he identified the corpse of the deceased to a doctor who performed a post-mortem examination.

It is not in dispute that on the day in question the deceased was in Tsieng village where he had gone to complain to Ramotsoafi Khongoanyana (P.W.6) that his animals had trespassed on his arable land and damaged his sorghum plants. He left at sunset.

Letsepa Phootha (P.W.7) testified that on the 10th October, 1989 he found four empty shells in the field of one Manki which he was ploughing. One of the four shells was ploughed under the soil and could not be recovered. They were found about five paces from where the body of the deceased was found.

Detective Trooper Mohlatsi testified that he transported the corpse of the deceased from Paray Hospital to Maseru. He examined it. It had an open wound on the forehead, an open wound infront of the right ear and another above the same ear. There were small wounds infront of the left ear and another small wound above the same ear. He was of the opinion that the wound on the forehead was not a gunshot wound. He formed the opinion that the wounds on the left side of the head were entry wounds while the ones on the right were exit wounds.

Detective Trooper Matete went to the scene of the crime on the 24th May, 1989. He observed an open wound on the forehead, an open wound behind the right ear and another open wound above the same ear. On the 26th May, 1989 he arrested P.W.1 and P.W.2. After they had given him their explanations he took them to the magistrate to make their confessions. The confessions were subsequently filed in the docket.

The evidence of Lt. Nchela is that the two shells found by P.W.7 and subsequently given to him were AK 47 rifle shells. He handed them in and were marked Exhibit 1 collectively. He was sure that no other gun uses that type of bullets.

Detective Trooper Ramone went to Tsieng with the A1 and other policemen. A1 gave him a knobkerrie. They went to Tsieng where the A1 stayed following an explanation which he made to him.

The evidence of Detective Trooper Khiba is to the effect that he had been looking for A1. He received information that he could be found at 'Mamookoli. He went there but did not find him. He received information that he was at Semenanyana. He then made a message to Mokhotlong Police Station asking them to Arrest A1 at Semenanyana. On the 26th January, 1990 he went to Mokhotlong and found A1 in the custody of the police. He arrested him and took him to Thaba-Tseka. AT Thaba-Tseka police station he cautioned the A1 and the latter said he would not give him any explanation and would answer or speak before a magistrate. Trooper Khiba says

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that he handed A1 over to Detective Trooper Matete and asked him to take A1 to the magistrate so that he could tell him what he had done. Trooper Khiba says that he later learnt that A1 had made a confession. He did not force A1 to go to the magistrate and never assaulted him. He made a confession on the 27th January, 1990.

The evidence of Mr. G.T. Jane is that he is the magistrate of Thaba-Tseka. On the 30th January, 1990 he was in his office when the clerk of court ushered A1 into his office. She immediately left and A1 remained with him. Mr. Jane says that he used the form commonly known as a confession form. The form is a questionnaire which is very comprehenisve and covers all aspects of whether the accused voluntarily and freely makes the confession. In addition to the oral investigation he made Mr. Jane says that he physically examined the wrists and arms of A1 and found no visible injuries. Having satisfied himself the A1 voluntarily and freely made a statement which he recorded in Sesotho which was the language used by A1. The A1 appeared to be in his sound and sober senses when he appeared before him. The English translation reads as follows:

> "We waylaid this person Makhalema Sejanamane. I was with other two people. We hit him until he was dead. We left him alone when he had already died. That is all."

After the statement was recorded Mr. Jane read it over to the accused and he placed his right thumb impression thereto.

The confession form was handed in evidence and marked Exhibit A. The translated copy was marked Exhibit AA.

Under cross-examination Mr. Jane said he already knew the A1 very well before this incident. He called the clerk of Court to come and witness A1's right thumb impression after the statement was made. He said he could not deny that A1 knows how to read and write. He denied that A1's right thumb print was taken at the charge office. He says that he cannot deny that he made the statement because he expected to get a benefit. He says that the statement was freely and voluntarily made by A1. He denies that he could make any mistake concerning the identity of A1.

Mr. Jane testified that he did not know A2. He cannot be sure that the person who appeared before him was A2 because he forgot to make that person sign the confession form.

Because the doctor who performed the post-mortem examination had already left this country when the preparatory examination and the trial commenced his post-mortem examination report was admitted in evidence in terms of section 223 (7) of the Criminal Procedure and Evidence Act 1981. The report was marked Exhibit C. The doctor formed the opinion that death was due to head injury. There was extensive depressed fracture probably caused by a blunt object used with great force. He also found the following external injuries:

(1) 4cm. laceration on right forehead
(2) 2 x 1cm. laceration above right ear.
(3) 1 x 1cm. laceration right temporal area.
(4) 1 x 1cm laceration above left ear.

He also found (1) fregmented depressed right temporal bone.

(2) Depressed left temporal bone
(3) Depressed right frontal bone
(4) Extensive epidural and subdural hemorrhage.
(5) Bruised right brain.

'Mathabang Masaile (P.W.16) is the clerk of Court at Thaba-Tseka Magistrate's Court. On the 30th January, 1990 she was on duty when a policeman brought A1 who was supposed to have come to make a confession. After the A1 had made a statement Mr. Jane called her into his office to witness the thumbprint of A1. When she entered into Mr. Jane's office A1 was just removing his thumb from Exhibit A. She immediately affixed her signature on Exhibit A. An attempt or suggestion was made that because there were other papers on the table of Mr. Jane she might have affixed her signature on a wrong paper. She refuted this suggestion by showing that she saw when A1 removed his thumb from Exhibit A and the stamp pad was next to the paper. She says that she knew A1 very well before this incident. She was adamant that the signature on Exhibit A is hers and not that of policewoman Molapo. She denied that A1's thumbprint on Exhibit A was taken at the charge office.

At the close of the Crown case Dr. Tsotsi, counsel for the 2nd accused applied to his discharge because the Crown had failed to establish a prima facie against him. The application was granted and the 2nd accused was found not guilty and discharged. The only evidence against him was a confession (Exhibit B) which was not signed by the deponent. Mr. Jane could not be sure that the person who appeared before him on that day was A2 because many people appear before him to make confessions.

A1 testified that he stays at Semenanyana. He originally lived at Tsieng but left that place in April, 1989. He went to live at Mathalaneng which is near Semenanyana where he was building his house. He never returned to Tsieeng at any time till he was arrested at Semenanyana. At Methalaneng he lived with his wife (D.W.3), Sekhohola Sekhohola (D.W.2) and 'Manthabiseng, the wife of D.W. 2. A1 says that on the 23rd May, 1989 he was at Methalaneng where he was threshing wheat and took the straw to Semenanyana and thatched his house with it.

He knew the deceased and heard on the radio that he was dead. He did not know the circumstances surrounding his death. At the time he heard the news on the radio he was with Sekhohola and his (A1's) wife. All the Crown witnesses who say that he was at Tsieeng on the 23rd May, 1989 are not telling the truth. He was not at Tsieeng on the 22nd May, 1989. He denies that on the day in question he was shearing goats at Ramotsoafi's place. He was not

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wearing a red blanket and does not even own any red blanket. He does not own any gun and never threatened P.W.1 and P.W.2 because he was not at Sekhutlong on the 23rd May, 1989.

A1 testified that he was arrested at Semenanyana on the 27th January, 1990 and was taken to Mokhotlong Police station. On the following day hewas transferred to Thaba-Tseka Police station. On arrival there he was handed over to policeman Mahleke. On the 29th January, 1990 he remained in the cell for the whole day and nothing happened. On the 30th he was called to the office and was interrogated. He told his interrogators that he owned no gun and knew nothing about the death of the deceased. He was taken back to the cell. The police later came into the cell and lashed them with sjamboks and forced him to tell them what he knew about the death of the deceased. He told them that he knew nothing.

He was never taken to a magistrate on that day. He was remanded on the 2nd February, 1990. He admits that he said he would talk before a magistrate if he was charged with the murder of the deceased. He says that Trooper Khiba never took him to a magistrate on the 30th January, 1990. He knows how to read and write and there was no reason why he could not have affixed his signature on Exhibit A. His fingerprints were taken at the charge office by Policewoman Matete. Mr. Jane and P.W.16 are not telling the truth that he made a confession on the 30th January, 1990 and put his right thumbprint on it.

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Under cross-examination A1 admitted that P.W.1 and P.W.2 knew him very well because he previously lived in their village. He never had any quarrel with them and is most surprised why they are falsely implicating him in this charge. P.W.1 and P.W.2 were taught by one policeman called Mokolatsie that they should implicate him in this case. He got this information from P.W.2 who used to visit him at the prison while he was awaiting trial. He knew Mr. Jane long before the present incident. He was challenged when he said he knew how to write and was given a piece of paper and asked to write the words "Lekhotla Le Phahameng". He was unable to do so. It is true that he could print his name and surname in very bad handwriting. He did so at the preparatory examination after he had informed the court that he was reserving his defence.

D.W.2 is Sekhohola Sekhohola who is the cousin of A1. His home is at Methalaneng which is very near Semenanyana. Because A1 wanted to build his house at Semenanyana he came to stay at D.W.2's place so that he could operate from that base. D.W.2 testified that A1 and his wife stayed at his place from the 12th April, 1988 to June, 1988. It later turned out during his giving of evidence that he was mistaken about the year. It was actually in 1989 when the couple was staying at his place. His evidence is that during the three months that A1 and his wife lived or stayed at his place A1 never went anywhere. They used to go to the fields with him to thresh straw for thatching his new house at Semenanyana. However he admitted that for four days

at about the same time that the deceased died he was at Matsoku.

The evidence of A1's wife is that during the three months that she and her husband stayed at the home of D.W.2 while they were building their house at Semenanyana A1 never went to Tsieeng or Sekhutlong. She said that on the 22nd and 23rd May, 1989 A1 was with her and never went anywhere. But she was unable to tell the Court why she remembered those two particular days inasmuch as she conceded that on some days the A1 left Methalaneng and never told her where he was going.

At the end of the defence case I called a fingerprint expert because the Crown had built a case that the fingerprint on the Exhibit A was that of the A1. On the other hand the defence had completely denied that that thumbprint was A1's. The expert Detective Warrant Officer Molise finally gave his evidence on the 24th May, 1991 after a few postponements. He testified that he has had special training here in Lesotho since 1976. An expatriate expert in fingerprinting was recruited by the Lesotho Government to train him and others locally. He testified that the first thumbprint which was sent to him together with the one which was Exhibit A was not clear because it was taken on a paper not suitable for that purpose. He supplied Exhibit F and Prison Officer Sehloho took the right thumb print of the A1. The long and the short of his evidence is that fingerprint on Exhibit A was identical with the fingerprint on Exhibt F. The enlarged photographs of the two fingerprints appear on Exhibit D and the report of D/W/O Molise is Exhibit E.

Other than the confession the case for the Crown depends on the evidence of P.W.1, P.W.2 and P.W.3. What surprised me when P.W.1 and P.W.2 were called as witnesses before this Court, Miss Moruthoane, the Crown Counsel, declared them as accomplices. I had, rightly or wrongly, read their depositions at the preparatory examination and there was no evidence that could make them to be accomplices in this case. An accomplice is defined as a person who is liable to be prosecuted either for the same offence as that with which the accused is charged, or as an accessory to such offence (S. v. Kellner, 1963 (2) S.A. 435 (A.D.). The evidence of the two witnesses at the preparatory examination as well as before this Court is that A1 invited them to accompany him to Sekhutlong where they were to help him to catch his horse which was apparently running wild. They agreed but when they arrived there A1 ordered them to go ahead and then wait for him some distance away. He then waylaid the deceased and shot him with a gun when he passed there. The two witnesses could not be charged with murder inasmuch as they took no part in the killing of the deceased. Nor did they assist the A1 in the disposal of the gun he allegedly used. Nor did they help him to hide the body or to dispose of it in such a way that it could not be found. One of them immediately reported to his mother that A1 had killed the deceased. I am of the opinion that the two witnesses are not accomplices and should not have been declared as such unless the Crown disclosed to the Court that despite what they said in their depositions at the preparatory examination, their statements to the police were different and made them accomplices. It was very important for the Crown Counsel to disclose this to the Court so

that when the credibility of the witnesses is considered the Court may caution itself according to the law relating to the evidence of accomplices. Be that as it may the evidence of the two witnesses seems to be unreliable and has to be approached with extreme caution.

One of the policemen who arrested P.W.1 and P.W.2 testified that after arresting them he took them to a magistrate before whom they made confessions. He was sure that the confessions were filed in the docket. I think it is on the basis of those confessions that the Crown declared them as accomplices.

When the evidence of P.W.1 and P.W.2 is contrasted with that of the other witnesses, especially the post-mortem of the doctor (Exhibit C), there can be no doubt that the two witnesses have not told the Court all what happened to the deceased. The doctor refers to extensive depressed fractures of the skull at three different places. He was of the opinion that the injuries were caused by the use of a blunt object and that a great degree of force was used. He does not refer to any gunshot wounds. I cannot accept that the doctor lacked experience of gunshot wounds to such as extent that he could not make a distinction between a gunshot wound and a laceration caused by either a sharp or blunt object. The lacerations referred to by the doctor could not have been gunshot wounds because he would have said so. I have formed the opinion that P.W.1 and P.W.2 are unreliable witnesses who decided not to tell the Court all what happened because they also

participated in the killing of the deceased. It is very clear from Exhibit C that a blunt object such as a stick or a knobkerrie was used to inflict those depressed fractures.

Detective Trooper Ramone testified that on the 30th January, 1990 A1 made a certain explanation as a result of which he and other policemen went to Tsieeng with A1. On their arrival there A1 took out a knobkerrie and gave it to them. That knobkerrie was handed in as an exhibit at the preparatory examination and marked Exhibit 2. It is unfortunate that that knobkerrie could no longer be traced at the trial. None the less the defence did not dispute the fact that A1 did produce a knobkerrie and gave it to the police. I have formed the opinion that the knobkerrie was the weapon used in the killing of the deceased.

The evidence of 'Mamontseng Setsumi (P.W.3) is somewhat unsatisfactory for two reasons: when she saw the accused, P.W.1, P.W.2 and one Sami, it was at dusk and they had just passed her house and she could only see their backs. I am of the opinion that because of the state of light and the fact that she saw their backs or saw them from behind at a distance of fifty yards away, she might be mistaken. Secondly, in her evidence-in-chief she said the five men mentioned above passed while she was still talking to the deceased. In cross-examination she changed her story and said the accused and their companions passed below her house before the deceased came to her place. She denied that in her evidence-in-chief she had just said that the five men passed while she was still

talking to the deceased. She could not accept that she made a mistake in her evidence-in-chief but flatly denied what she had just said. I find it hard to believe her evidence.

I now come to the most important part of this case - the confession. There are two sections which deal with confessions in our Criminal Procedure and Evidence Act 1981; they are sections 228 and 240. Section 228 (1) (2) reads as follows:-

> "(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person provided the confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.
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> (2) If a confession is shown to have been made to a policeman, it hsall not be admissible in evidence under this section unless it is confirmed and reduced to writing in the presence of a magistrate.",

Section 240 (2) reads as follows:

> "(2) Any court may convict a person of any offence alleged against him in the charge by reason of any confession of that offence proved to have been made by him, although the confession is not confirmed by any other evidence, provided the offence has, by conpetent evidence other than the confession, been proved to have been actually committed."

It seems to me that in the present case the crucial question to be decided is not whether the confession was freely and voluntarily made but it is whether A1 ever appeared before the

magistrate and made any confession. Be that as it may I am of the view that the question of whether the confession was freely and voluntarily made still has to be decided by the Court. A1 was arrested by Detective Trooper Khiba on the 26th January, 1990. On their way from Mokhtlong to Thaba-Tseka Trooper Khiba did not assault A1 and the defence never suggested that he was assaulted or ill-treated in any manner. When they arrived at Thaba-Tseka Trooper Khiba cautioned the A1 in terms of the Judges' Rules. A1 said he would not give any explanation to him (Trooper Khiba) but he said he was prepared to answer before a magistrate. He handed him over to Trooper Matete and asked him to take A1 to a magistrate to tell him what he had done. He says that he did not force the A1 to go and make a confession.

In his evidence Trooper Matete never said that he took A1 to the magistrate on the 30th January, 1990. There is no policeman who testified that he took A1 before a magistrate to enable him to make a confession. But we have the evidence of P.W.16 'Mathabang Masaile which is to the effect that she is a clerk of Court at Thaba-Tseka magistrate's Court. On the 30th January, 1990 a policeman brought A1 to her office and told her that he wanted to make a confession. She received him and led him into the office of the magistrate, Mr. Jane. She already knew A1 very well before this incident.

I am convinced that A1 was taken to the clerk of court by a policeman and it seems to me to be immaterial who that policeman was because the defence never alleged that A1 was assaulted or forced

by that policeman to make a confession. The A1's version is that on the 30th January, 1990 he was interrogated by some policemen including one Trooper Mahleke. He denied any involvement in the killing of the deceased. He was returned to the cell. Later policemen came and lashed him to tell them what he knew about the death of the deceased, he said he knew nothing. They left him alone. On that day he was never taken to a magistrate to make a confession and he never made any confession until the 2nd February, 1990 when he was remanded. A1 says Mr. Jane and P.W.16 are not telling the truth that on the 30th January, 1990 he appeared before a magistrate and confessed.

It is common cause that A1, Mr. Jane and P.W.16 know each other very well. They had known each other long before the 30th January, 1990. I do not believe that Mr. Jane and P.W.16 can make a mistake about the identity of the A1 at that very important moment. I have believed the evidence of Mr Jane and P.W.16 that A1 confessed in Mr. Jane's office on the 30th January, 1990. P.W.16 positively identified her signature as witness to the finger print of Exhibit A. She gave a specimen of her signature in court which appeared to be the same with that on Exhibit A. She saw when the A1 put his thumb print on the Exhibit A because when she entered into Mr. Jane's office A1 was just removing his thumb from Exhibit A and she immediately signed as a witness.

The evidence of A1 that he was assaulted by one Mahleke is obviously an afterthought and must be rejected. It was never put to

the Crown witnesses that a policeman named Mahleke assaulted A1. We heard for the first time about Mahleke when A1 was giving evidence in the witness - box. It is trite law that the defence must put its case to the Crown witnesses to enable the Court to observe their reaction. Failure to do so does not mean that the Court must ignore the evidence of the accused. His evidence must be given a thorough consideration. In the instant case the A1 does not say he made a confession because Mahleke assaulted him and forced him to make a false confession. His story is that he never made a confession at all.

I am satisfied that A1 made the confession appearing on Exhibit A. That statement amounts to a confession because A1 says they waylaid the deceased and they hit him until he died. There is no question of self-defence or provocation. P.W.2 said that after shooting the deceased A1 said he killed him because he (deceased) was troubling him by causing his arrests by policemen. P.W.1 was present when these words were allegedly uttered but his version is that A1 said the deceased troubled him but did not explain how he troubled him. As I said above P.W.1 and P.W.2 are very unreliable witnesses and it is impossible to know when they are telling the truth.

I called Warrant Officer Molise, who is an expert in identification of fingerprints, and he was positive that the thumb-print on Exhibit A was identical with the thumbprint on Exhibit F. I accepted his evidence because on Exhibit D even a layman can see some similarities.

I am of the view that there is evidence aliunde that a crime was committed. The evidence regarding the injuries proves beyond any reasonable doubt that the deceased was murdered. The deceased fractures of the skull are consistent with the use of a blunt object such as a stick or a knobkerrie. The injuries are not consistent with those of a person who was thrown down by a horse. After the killing the deceased was taken from the path and placed on the contour furrow in a nearby field. All these things prove the commission of murder.

It is trite law that even when section 240 (2) of the Criminal Procedure and Evidence Act 1981 is satisfied, it will not necessarily be safe to convict. There is still the over-riding requirement that the court must be satisfied beyond reasonable doubt that the accused is guilty. The court must therefore consider whether the confession is reliable. This may appear from the surrounding circumstances or from the contents of the confession itself (Hoffmann: South African Law of Evidence, 2nd edition p. 409).

In R. v. Fuwane, 1956 (4) S.A. 761 at p. 764 Clayden, F.J. said:

> "Now this in our view was not a correct approach by the Court. The question was not simply whether the confession was genuine, but whether the Crown, by means of it, if genuine, and having regard to other evidence had proved beyond reasonable doubt that the appellant through the agency of Lizzie murdered the deceased. In the case of Sykes, 8 Cr. App. Rep. 233 at p. 236 Ridley, J., discussed the tests to be applied to a confession:
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> ..... the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

In the instant case the contents of the confession are consistent with the medical evidence that a blunt object was used to inflict the injuries. A1 produced a knobkerrie and gave it to the police.

A1 had the opportunity to commit the offence. His alibi was rejected by the Court. The evidence of D.W.2 did not exclude the fact that while he was away from his home for four days A1 went to Tsieeng. The evidence of A1's wife is also unsatisfactory because she admitted that sometimes he left Methalaneng village without telling her where she was going. She failed to give any reason why she remembered that on the 22nd and 23rd May, 1989 A1 was at home with her. She could not remember the dates on which A1 left without telling her where he was going.

I have earlier in this judgment said that P.W.1 and P.W.2 are unreliable witnesses inasmuch as they did not tell the Court how they participated in the commission of this offence. I have no doubt that they took part in the killing of the deceased. They made confessions which were unfortunately not disclosed to the Court. In my view the Crown ought to have disclosed that the evidence given by these two witnesses was inconsistent with the statements they made earlier and to have applied for leave to read the statements and to hand them in as evidence. In any case it does not necessarily follow that once the court has rejected one part of the evidence of a witness it must reject all his or her evidence. The Court may believe some parts and reject others depending on the circumstances of the case.

In the instant case I have formed the opinion that P.W.1 and P.W.2 are telling the truth that they were present when the deceased was killed by A1 but the only part they left out is their participation in the killing. To this extent their evidence confirms or corroborates the confession.

I must mention that the finding of empty shells near the scene of the crime about five months after the commission of the crime is irrelevant. The area of the scene of the crime was thoroughly searched for clues immediately after the commission of the crime but no empty shells were found. It seems to me that anything could have happened during those five months. In any case the deceased was not shot with a gun. If there was any firing of a gun

on that day the deceased was not hit by any bullet. It is possible that a gun was fired and its sound caused the horse to jump and to throw the deceased to the ground enabling his killer or killers to hit him with blunt object. This is, of course, mere speculation.

For the reasons stated above I come to the conclusion that the confession was freely and voluntarily made by A1 in his sound and sober senses. He was not influenced in any way to make a confession but he seems to have been under the wrong impression that after making the confession he would be released on bail or on his own recognizances. I think the learned magistrate ought to have told him that his release would not automatically follow. However, that does not vitiate the fact that the confession was made freely and voluntarily. The accused had the requisite intent to kill in the form of dolus directus.

I find the accused guilty of murder.

My assessors agree.

J.L. KHEOLA
JUDGE

16th August, 1991.

For Crown - Miss Moruthoane
For Defence - Mr. Fosa.

EXTENUATING CIRCUMSTANCES

Mr. Putsoane submitted on behalf of the accused that there was no premeditation. I do not agree with that submission. The accused must have seen the deceased in Tsieeng village and knew that he (deceased) would be returning to his village that evening. He planned to go to Sekhutlong and to waylay him there. He then asked P.W.1 and P.W.2 to accompany him to Sekhutlong alleging that he wanted them to assist him to catch his horse. He was actually lying because he had no horse at that place. He waylaid the deceased and killed him by hitting him on the head causing several depressed fractures of the skull. He used a knobkerrie to cause the injuries.

Mr. Putsoane further submitted that according to the evidence of P.W.1 and P.W.2 the deceased troubled the accused so much that he regarded him (deceased) as a menace who caused his unwarranted arrests. He subjectively thought that the only way to get rid of this menace was to kill him. He referred to the case of Naro Lefaso v. Rex, C. of A. (CRI) 7 of 1989 (unreported) at pages 10-11 where Schutz, P. said:

> "The judgment on extenuation reflects that the appellant's counsel argued as follows: "A woman 'Mamoliehi whose name appeared time and again in this case is said to have been in love with the accused. She is also said to be the deceased's close relative. The court was asked to take into

account that in the absence of this woman's husband the deceased had a high degree of care over her. Accused through his counsel maintains that 'Mamoliehi has caused the breakdown of accused's own marriage in the sense that he and she lived virtually as man and wife. 'Mamoliehi played on accused's feelings to the extent that she urged him to get rid of the deceased who seemed to be interfering in their illicit love affair. It was projected as accused's weakness or human frailty that he failed to appreciate that deceased was entitled to live also; and thus fell to the temptation of putting her away at the instigation of his lover 'Mamoliehi."

The first difficulty with this argument is that in his evidence the appellant said that he had loved 'Mamoliehi long ago, but that when the deceased died they were not in love. The second difficulty is that there was no evidence to support the argument. It had been open to the appellant at the extenuation stage to give evidence again, contradict his former evidence of innocence, and try to persuade the Court that extenuating circumstances existed. This would have involved admitting guilt. But this the appellant did not do. He tried to ride two horses, protesting his innocence (as his argument in this appeal shows), whilst contending in the alternative that if he was guilty his guilt was extenuated by facts that supplied the motive for the murder that he in fact committed. This is generally a difficult posture, and in this case, I think, an impossible one. He cannot have it both ways. If he had given evidence anew, admitted guilt and sought to prove extenuating circumstances, he would have been subject to cross-examination, in which his subjective state of mind, a matter of great importance, could have been tested.

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> This leads to the third major difficulty. Even if the version argued were to be accepted, it is far too general, in my view, to establish extenuation. The mere fact that a person stands between another and a desired object does not mean that the murder of the former by the latter is extenuated. If it were otherwise a wife who murders her husband in order to encash the insurance policies he has taken out on his life in her favour could be said to have her moral guilt lessened because of the fact of the husband's "obstruction". For the argument raised to succeed it would be necessary to probe the state of mind and fellings of the appellant and this presupposes evidence."

In the present case the accused did the same thing as the appellant in Lefaso's case - supra by not going into the witness box and giving his evidence anew and admitting guilt and seeking to prove extenuating circumstances and submitting to cross-examination in order to establish his subjective state of mind. P.W.1 and P.W.2 do not claim to have personal knowledge that the deceased used to cause the arrest of the accused. To establish that fact the accused ought to have given evidence because we do not know whether he was telling the truth when he uttered those words.

I find that there are no extenuating circumstances.

Sentence:- The Accused is sentenced to death. You will be returned to custody and you will be hanged by the neck until you are dead.

J.L. KHEOLA
JUDGE

30th August, 1991.

For Crown - Miss Moruthoane

For Defence - Mr. Putsoane